IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1941.**

**No. 299.**

T. E. STEPHENS,

*Petitioner,*

—against—

RICHMAN & SAMUELS, INC.,

*Respondent.*

## *BRIEF OF RESPONDENT.*

### I.

### Opinions Below.

The opinion of the United States District Court for the Southern District of Texas, Brownsville Division has not been reported but will be found on pages 278-291 of the Record. The opinion of the United States Circuit Court of Appeals for the Fifth Circuit is reported in 118 Fed. (2d) 1011 and appears on pages 402-404 of the Record.

### II.

### Jurisdiction.

The judgment of the United States Circuit Court of Appeals for the Fifth Circuit was entered on

April 1, 1941 (R. 404). Petition for a rehearing was filed by petitioner on April 14, 1941 (R. 405-411) and was denied on May 10, 1941 (R. 412).

Petition for a writ of certiorari was filed in this Court on July 22, 1941. The jurisdiction of this Court is invoked under Sec. 240(a) of the Judicial Code as amended by the act of February 13, 1925, 43 Stat. 938.

## III.

## Questions Presented.

1. Was jurisdiction acquired in this suit over the person of the respondent by virtue of either the Texas Statute or the appointment by the respondent of a service agent in Texas when (1) before this suit was commenced and service of process attempted, respondent had ceased doing business in, had withdrawn from, and had cancelled its permit to do business in Texas and had revoked its appointment of the service agent upon whom service in this suit was attempted, (2) when neither at the time this suit was instituted and service attempted, or at any time since, was respondent doing business in Texas, and (3) when the causes of action asserted by the petitioner (a) arose outside of Texas, (b) and/or accrued before Article 2031A of the Revised Civil Statutes of Texas (the statute relied upon by petitioner and hereinafter referred to by us as the Texas Statute) was enacted and before respondent obtained a permit to do business in Texas and appointed a service agent therein, and/or (c) arose out of transactions in interstate commerce?

2. Has this Court the power to review the findings and rulings of the lower courts when the petitioner

failed to object or take exception to or challenge the sufficiency by motion or otherwise of any finding or ruling of the District Court, or to request the District Court to make any finding or ruling in his favor, or to make any motion for judgment in his favor; and further, when petitioner in his "Statement of Points on Which He Intends to Rely on Appeal", filed by him in connection with his appeal to the Circuit Court, failed to complain of or challenge any finding or ruling of the District Court or challenge the sufficiency of the evidence to support the findings, or rulings or conclusions based upon such findings, and failed to quote or point out the evidence with respect to which the District Court may have made any improper finding or ruling?

3. If this Court has such power, are the findings of the lower courts that the several causes of action asserted by petitioner arose outside of Texas and the finding by the District Court that the causes of action, with the exception of one item involving the sum of $62.78, arose before the Texas Statute was enacted and before respondent obtained a permit to do business in Texas and appointed a service agent therein, so clearly erroneous as to justify this Court in disturbing them?

Petitioner, on page 6 of his brief, states that one of the questions presented is whether or not the revocation by the respondent of its appointment of the service agent upon whom service of process in this suit was made was effective to invalidate such service. This is not a proper question because, as we shall show under Point V of this brief, no jurisdiction would have been acquired in this suit even if respondent had not revoked said appointment, although, as we shall also show under said point, the

revocation of said appointment by the respondent was effective to defeat service of process in this suit.

In connection with the first question, both lower courts held that no jurisdiction was acquired over the person of the respondent by virtue of either the Texas Statute or the appointment by the respondent of a service agent because it was not doing business in Texas when sued and the several causes of action arose outside of Texas; the District Court further held that no jurisdiction was acquired because the causes of action accrued before the Statute was enacted and before respondent obtained a permit to do business in Texas and appointed a service agent therein; but neither court made any finding as to whether the causes of action arose out of transactions in interstate commerce, or made any ruling as to whether or not the statute or the appointment applied to such causes of action.

## IV.

### Statute Involved.

Petitioner has given the complete text of Article 2031A of the Revised Civil Statutes of Texas in the appendix to his brief, pages 50-53. For purposes of clarity, however, we shall quote here what we consider the material portions of said statute:

> "Section 1. From and after the effective date of this Act, each and every foreign corporation seeking a permit to do business in this State, and as a prerequisite to its right to secure a permit to do business in Texas, and each and every foreign corporation already having a permit to do business in this State on the effective date hereof, shall file in the office of the Secretary of

State a power of attorney designating some individual who is a resident citizen of this State, as its service agent, upon whom process may be served in all suits, proceedings and causes of actions pending or hereafter filed in this State, in which said foreign corporation is a party or is to be made a party, which power of attorney shall be in effect so long as said foreign corporation is authorized to do business in Texas, and for a period of four years from and after the date any such foreign corporation shall have surrendered its charter or has ceased to do business in Texas;

"Sec. 5. If any corporation which is required by the terms of this Act to file the power of attorney and designate a service agent as provided by this Act, shall fail to do so at or within the time as required by this Act, then in such event:

"(b) Such corporation shall be incapacitated to maintain any suit or legal proceedings in any court in this State upon any demand whether arising out of contract or tort.

"Sec. 7. The fact that there is no adequate statutory provision in this State regulating the service of process on foreign corporations, especially foreign corporations, which might cease to do business in Texas and have no agent in Texas upon whom process may be served, creates an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days be suspended, and said Rule is suspended and this Act shall take effect and be in force from and after its passage, and it is so enacted.

"Approved June 6, 1933.

"Effective 90 days after adjournment."

## V.

### Statement of the Case.

The following facts are not disputed:

1. This suit was filed against respondent in the District Court of Hidalgo County, Texas on April 9, 1938 (R. 38-39) and service of citation was made upon Travis B. Moursund in Bexar County, Texas on April 12, 1938 (R. 61-62). Subsequently, on application of respondent, the suit was removed to the United States District Court for the Southern District of Texas, Brownsville Division (R. 39-40).

2. On January 19, 1938, which was prior to the time this suit was commenced and service of citation attempted, respondent, a New York corporation, had ceased doing business in, had withdrawn from, and had cancelled its permit to do business in Texas; and respondent was not doing business in Texas at the time this suit was commenced and service attempted or at any time since (R. 126-7, 284),

3. On January 25, 1938, which was prior to the time this suit was commenced and service of citation attempted, respondent by an instrument in writing revoked the appointment of the said Travis B. Moursund as its agent for service of process (R. 61-62, 126-127, 278-279),

4. Respondent did not come into existence until August 1925, when it became incorporated under the laws of the State of New York (R. 18-19, 284),

5. Respondent did not obtain a permit to do business in Texas until August 13, 1934 (R. 113, 284; 403), and on July 30, 1934 it executed and filed in the office of the Secretary of the State of Texas the appointment of Travis B. Moursund as its agent for service of process in Texas (R. 120-1, 110).

Both lower courts concurred in finding upon the evidence that the several causes of action asserted by petitioner in this suit arose outside of the boundaries of Texas (R. 282-284, 289, 402-404). The District Court further found that, with the possible exception of an item involving the sum of $62.78, all the causes of action were based upon transactions which occurred before the Texas Statute went into effect on September 1, 1933, and, therefore, before respondent obtained its permit to do business in Texas on August 13, 1934 and before respondent appointed a service agent in Texas on July 30, 1934 (R. 289-290).

Respondent's motion to dismiss this suit for lack of jurisdiction over its person was heard and determined upon the evidence. Petitioner testified that for the 1922-23, 1923-24, and 1924-25 seasons he was employed by the partnership of Richman & Samuels, whose place of business was in New York City, as their Texas manager, his compensation to be a fixed salary plus a share of the profits (R. 24-25, 152, 158, 161-2, 305-6, 308, 311-13, 315-16, 331). As to these seasons petitioner testified that his fixed salary was paid and his only claim is for a share of the alleged profits (R. 332-333); that as to each of these seasons, the partnership kept at its New York offices all the books, records, and accounts (R. 148, 307, 317, 321, 323, 325, 331), and there rendered accountings and made payments to him of what they considered his

share of the profits (R. 308, 314, 317-18, 321, 323, 326, 329, 332-33).

Petitioner alleges in his complaint that on June 1, 1925 his employment was continued by said partnership for the 1925-26 season (R. 69), and he testified that he went to New York some time in the summer of 1925 and there probably, although he was not certain, entered into a contract of employment with the partnership for said season (R. 317-318). Petitioner alleges in his complaint that respondent became incorporated under the laws of the State of New York in August, 1925, with its principal place of business in New York City, and that at such time it assumed all of the liabilities of the partnership as well as the contract of employment which was previously entered into between him and the partnership for the 1925-26 season (R. 68-69). However, petitioner nowhere alleges that respondent agreed to assume or pay said liabilities or assume or perform said contract in Texas; as to the evidence, the record is completely devoid of one scintilla of evidence that respondent agreed to assume or to pay in Texas or elsewhere the liabilities of the partnership (R. 283, 403).

Petitioner testified that he was employed by the respondent for the 1926-27 season and in answer to the question as to where his contract of employment for that season was made, he said, "I wouldn't say definitely just where it was made; maybe in Weslaco, maybe in New York" (R. 319-20, 324). Petitioner admits in his complaint and he testified that his employment with the respondent terminated in June 1927 and that at no time thereafter was he in its employ (R. 70-73, 321, 325). As to each of said seasons, to wit, 1925-26 and 1926-27, petitioner testified that his fixed salary was paid and that he claims only for his share of the profits for these seasons (R.

332-3); that all books, records, and accounts were kept by respondent at its New York office (R. 319, 321, 323, 325, 331); that respondent rendered an accounting to him and settled with him at its New York offices for what it considered his share of the profits for the 1925-26 season (R. 319, 320-1, 323, 333), but that it never made an accounting to him for his share of the profits of the 1926-27 season (R. 157, 325). The record is wholly lacking in any evidence of any agreement by the partnership or the respondent to pay in Texas for the petitioner's services (R. 283). As shown by petitioner's complaint and testimony, the only claims that petitioner asserts against respondent after June 1927, when his employment by respondent terminated, are in connection with alleged shipments of produce on consignment from Texas to respondent in New York City to be sold by the respondent on a commission basis for the accounts of various companies in Texas to whose rights and interests petitioner alleges he succeeded (R. 72, 74-5, 325, 329-30). Petitioner testified that there was no express agreement with the respondent as to any of these shipments and that each shipment constituted a separate transaction (R. 328-9, 374-5); that all books and records concerning these shipments were made and kept by respondent at its New York offices (R. 321-3, 325, 329, 331); and that all accounts and payments in connection with these shipments were made by respondent at its New York offices (R. 322-3, 329, 333).

Without complying with court rules, petitioner filed an amended complaint and annexed thereto as exhibits itemized schedules purporting to show the various amounts he seeks to recover in this suit and the dates of the transactions with which they were connected (R. 88-101). These exhibits show that, with the exception of one item of $62.78 which allegedly is con-

nected with a transaction in February 1935 (R. 89), all transactions involved in this suit occurred before the Texas Statute was enacted, before respondent obtained a permit to do business in Texas on August 13, 1934, and before respondent appointed an agent for service of process in Texas on July 30, 1934. Exhaustive examination of not only the petitioner but also his witnesses failed to produce one shred of evidence of any transactions with the partnership or the respondent other than those shown in the aforesaid exhibits (R. 173, 326-28, 372-78, 335-6, 348, 383, 267-8).

Both lower courts held that no jurisdiction was acquired over the person of the respondent in this suit because the several causes of action asserted by petitioner arose outside of Texas and the respondent was not doing business in Texas at the time this suit was instituted or at any time since. The District Court held as a further ground for its decision that, with the exception of the aforesaid item of $62.78, all of the causes of action accrued before the Texas Statute went into effect and before respondent secured a permit to do business in Texas and appointed an agent for service of process in Texas. Petitioner failed to object or take exception to, or challenge the sufficiency by motion, or otherwise, of any finding or ruling of the District Court, nor did he make any motion for judgment in his favor, although he had ample time to do so between the date on which the District Court filed its memorandum of findings and decision (R. 278) and the date of the entry of the final order of dismissal (R. 290-1). The only exception taken by the petitioner was to the entry of the final judgment by the District Court (R. 291). In appealing to the Circuit Court of Appeals from the judgment of the District Court, the petitioner elected to file a "State-

ment of Points on Which He Intends to Rely on Appeal" (R. 291-297); but nowhere in said statement did petitioner complain of or challenge any finding or ruling of the District Court, nor did he challenge the sufficiency of the evidence to support the findings or rulings or conclusions based upon such findings, nor did he quote or point out the evidence with respect to which the District Court may have made any improper finding or ruling.

Petitioner now seeks review on writ of certiorari of the judgment of the Circuit Court of Appeals for the Fifth Circuit which affirmed the judgment of the District Court quashing the service of citation and dismissing this suit for lack of jurisdiction over the respondent's person.

## POINT I.

### A.

**This Court has no power to review the evidence or the findings of fact made by the lower courts because of the failure of the petitioner to preserve these matters for review.**

***The Authorities.***

*Harvey Co.* v. *Mallory*, 288 U. S. 415;
*Fleischmann* v. *U. S.*, 270 U. S. 349;
*Union Bleachery* v. *U. S.*, 79 Fed. (2nd) 549;
*Massachusetts etc.* v. *Preferred, etc.*, 110 Fed. (2nd) 764;
*Drybrough* v. *Ware*, 111 Fed. (2nd) 548;
*Butler* v. *U. S.*, 108 Fed. (2nd) 27;
*Bank of Waterproof* v. *F. & D. Co.*, 299 Fed. 478.

The rule has been firmly established by this Court, as well as other Federal Appellate Courts, that they

have no power to review the evidence or the trial court's findings of fact upon such evidence when, as in the instant case, the appellant has failed to object or except to any evidence or ruling of the trial court, has failed to challenge by motion or otherwise the sufficiency of the evidence to support any finding or ruling of the trial court or has failed to request the trial court to make any finding or ruling in his favor, and the only exception which he has taken is to the entry of the final judgment. Therefore, this Court should not give consideration to any of the contentions of the petitioner as to what the evidence shows with respect to where his alleged contracts with respondent were made, where his services were performed, where he was to be compensated for his services, where respondent's agents solicited his business, whether the causes of action grew out of business that respondent may have done in Texas, or where the causes of action arose. As was said in *Union Bleachery* v. *U. S.*, 79 Fed. (2nd) 549 (*supra*):

> "It is well settled, of course, that the findings of the trial judge in a case such as this have the effect of the verdict of a jury, and that, even where properly excepted to, they will not be disturbed if supported by any substantial evidence. It is equally well settled that we will not review the findings of fact to ascertain whether they are supported by substantial evidence, or pass upon questions of law not apparent upon the face of the primary record, unless the attention of the court below has been directly drawn thereto and right of review has been preserved by exception duly and seasonably entered (cases cited). * * *
>
> "This rule requiring specific exceptions is not an arbitrary or technical one. Its purpose is

> to require counsel, at the proper time, to call attention to the claimed error with such certainty and definiteness that the court will understand clearly the precise action which is attacked or the precise action which is sought to be obtained, and will have opportunity to correct its ruling with respect thereto if convinced that it is erroneous. The vice of a general exception is that it calls the attention of the court to nothing except that the defeated litigant is not satisfied with the judgment against him."

Further, not a single one of the "Statement of Points on Which He Intends to Rely on Appeal", submitted by petitioner to the Circuit Court of Appeals (R. 291-7), was sufficient to present any reviewable question to that court because nowhere in said statement did petitioner complain of any finding or ruling of the District Court, nor did he challenge the sufficiency of the evidence to support the findings of fact of the District Court or the rulings or conclusions of the District Court with respect to such findings, nor did he quote or point out the evidence with respect to which the District Court may have made any improper finding or ruling. See *Butler, et al.* v. *U. S.*, 108 Fed. (2nd) 27 (*supra*).

## B.

**The findings of the lower courts should not be disturbed by this Court because not only are they not clearly erroneous but they are substantially supported by the evidence.**

### *The Authorities.*

*U. S.* v. *O'Donnell*, 303 U. S. 501;
*Pick Manufacturing Co.* v. *General Motor Co., et al.*, 299 U. S. 3;

*Page* v. *Arkansas Gas Co.*, 286 U. S. 269;
*U. S.* v. *Commercial Credit Co. Inc.*, 286 U. S. 63;
*Rutland, et al.* v. *Wilson*, 108 Fed. (2nd) 92.

Both lower courts concurred in finding that the causes of action arose outside of Texas (R. 282-84, 289, 402-4). The District Court further found that, with the possible exception of one item involving $62.78, all causes of action accrued prior to the enactment of the Texas Statute and prior to the time respondent obtained a permit to do business and appointed a service agent in Texas (R. 289-90). These findings are substantially supported by the evidence (This brief, pp. 7 to 10). Certainly they are not so clearly erroneous as to justify this Court in disturbing them. As this Court said in *Pick Manufacturing Co.* v. *General Motor Co., et al.*, 299 U. S. 3 (*supra*):

> "Under the established rule this Court accepts the findings in which two courts concur unless clear error is shown."

And as was said in *Rutland, et al.* v. *Wilson*, 108 Fed. (2nd) 92 (*supra*):

> "A careful consideration of appellant's complaint of the fact findings in the light of the established rule that such findings will not be disturbed on appeal, unless shown to be clearly erroneous, convinces us that the complaint must be rejected."

## POINT II.

**No jurisdiction was acquired over respondent's person since neither the Texas Statute nor the appointment by respondent of a service agent applies to a suit, such as this, brought against respondent, a foreign corporation, after it had ceased doing business in Texas upon causes of action arising outside of that state.**

### *The Authorities.*

*Chipman* v. *Jeffrey*, 251 U. S. 373; 64 L. Ed. 314; 40 S. Ct. 172;

*Mitchell, etc.* v. *Selden*, 257 U. S. 213; 66 L. Ed. 20; 42 S. Ct. 84;

*Hunter* v. *Mutual, etc.*, 218 U. S. 573; 31 S. Ct. 127;

*Morris & Co.* v. *Scandinavia, etc.*, 279 U. S. 405; 73 L. Ed. 762; 40 S. Ct. 360;

*Morris & Co.* v. *Scandinavia, etc.*, 81 Fed. (2nd) 346;

*Ambrose Johnson* v. *Richman & Samuels, Inc.* (U. S. District Court, Southern District of Texas, Laredo Division, opinion not published, see appendix, pages i to iv);

*Moore* v. *National Hotel, etc.*, 21 Fed. Supp. 177;

*Missouri Pacific, etc.* v. *Clarendon Co.*, 257 U. S. 533;

*Simon* v. *Southern Ry. Co.*, 236 U. S. 115; 59 L. Ed. 492; 35 S. Ct. 255;

*Old Wayne, etc.* v. *McDonough*, 204 U. S. 8; 51 L. Ed. 345; 27 S. Ct. 236;

*People's etc.* v. *American etc.*, 246 U. S. 79; 62 L. Ed. 587;
*Alexander, etc.* v. *National, etc.*, 33 Fed. Supp. 334.

Both lower courts found that all causes of action involved in this suit arose outside of Texas. While this finding is not subject to review by this Court, it is not only not clearly erroneous, but is substantially supported by the evidence (Point I(A) and (B) of this brief).

This court has many times held, in construing statutes and appointments by foreign corporations of service agents, similar to and at least as broad in its language as the statute and appointment in this suit, that, in the absence of compelling language in the statutes and appointments or local state decisions to the contrary, they do not apply to or confer jurisdiction in a suit brought against a foreign corporation after it ceases doing business in the State upon a cause of action arising outside of the State, or, conversely, upon a cause of action which does not accrue within the State at a time when it is transacting business in the State under a license from the State to do such business. The decisions were summarized and the rule was clearly stated in *Morris & Co.* v. *Scandinavia, etc.*, 81 Fed. (2nd) 346, (*supra*), wherein it was said:

> *"However, in the absence of compelling language in the state law, or local state decision to the contrary, such appointments will be construed by the United States Supreme Court to exclude causes of action arising outside the state for which the appointment was given. Morris & Co.* v. *Scandinavia Ins. Co., supra; Robert Mitchell Furniture Co.* v. *Selden Brack Construction Co.*, 257

U. S. 213, 42 S. Ct. 84; 66 L. Ed. 201; *Missouri Pacific Railroad Co.* v. *Clarendon Boat Car Co. Inc.*, 257 U. S. 533, 42 S. Ct. 210, 66 L. Ed. 354. In those cases, however, where the appointments and statutes do extend to causes of action arising outside of the state where the appointment was given, they are not effective as to causes of action arising outside of the state unless the defendant corporation is actually doing business in that state at the time of the service upon such agent. *Chipman, Ltd.* v. *Jeffrey Company*, 251 U. S. 373, 40 S. Ct. 172, 64 L. Ed. 314." (Italics ours.)

There is no decision of any court in Texas, Federal or State, nor is there anything in the language of the Texas Statute or the appointment involved in this suit, which would justify a construction contrary to that given by the Court in the case just cited.

Petitioner states on page 11 of his brief that the courts of Texas have not as yet construed the Texas Statute. The District Court stated that the statute has not been construed by any state court of Texas (R. 285). We know of at least two cases, however, in which the statute was construed by Federal Courts sitting in Texas: *Moore* v. *National, etc.*, 21 Fed. Supp. 177 (*supra*), and *Ambrose Johnson* v. *Richman & Samuels, Inc.* (*supra*). In *Moore* v. *National etc.*, it was held that neither the Texas statute nor the appointment thereunder by defendant, a foreign corporation, of a service agent in Texas applied to a cause of action accruing outside of Texas even though, unlike the situation in the instant case, the defendant was actually present and doing business under a permit to do business in Texas at the time it was sued, and the defendant's appointment of a service agent was unrevoked and in full force and effect. In the *Ambrose Johnson* case the party defendant and the jurisdic-

tional facts, including the appointment by the defendant of a service agent in Texas, were identical with those in this suit, except that the plaintiff in the former suit sued only to recover liabilities to him of the partnership of Richman and Samuels alleged to have been assumed by the corporate defendant. The court construed the statute and appointment as not applying to a cause of action arising outside of Texas; hence, it quashed the service of process and dismissed the suit for lack of jurisdiction upon finding that there was no evidence that the defendant agreed to assume or to pay in Texas the partnership liabilities.

There is no compelling language in the statute or the appointment to justify their being applied to a cause of action arising outside of Texas. The Texas Statute refers to a foreign corporation "seeking a permit to do business in this State", and as a "prerequisite to its right to secure a permit to do business in Texas", and throughout repeatedly refers to a foreign corporation's "doing business in Texas", and it is only in consideration of the privilege of "doing business in Texas" that a foreign corporation is required to appoint a resident citizen of Texas as its agent for service of process in any suit brought against it in that State. The appointment authorized respondent's service agent to receive service of process on its behalf "subject to and in accordance with all the provisions of the laws of the State of Texas". It is a reasonable conclusion, therefore, that the statute and the appointment apply only to suits which are based upon causes of action arising in Texas, and that, when respondent in consideration of the privilege of securing a permit to do business in Texas appointed a service agent therein, it agreed to be sued in Texas only with respect to causes of action accruing in Texas.

Application of the decisions in such cases as *Chipman* v. *Jeffrey*, 251 U. S. 373 (*supra*), *Hunter* v. *Mutual, etc.*, 218 U. S. 573 (*supra*), *Mitchell, etc.*, v. *Selden, etc.*, 257 U. S. 213 (*supra*), *Morris & Co.* v. *Scandinavia, etc.*, 81 Fed. (2nd) 346 (*supra*) and *Johnson* v. *Richman & Samuels, Inc.* (*supra*), to the facts involved in this suit must necessarily result in its dismissal for lack of jurisdiction over the person of the respondent. In each of those cases the statute and the appointment by the defendant foreign corporation was similar to and at least as broad in its language as the statute and the appointment in this suit; yet in each case the court construed the statute and the appointment as not applying to a suit against a foreign corporation after it ceased doing business in the State upon a cause of action arising outside of the State, and it dismissed the suit for lack of jurisdiction over defendant's person upon finding that the suit was of such a nature. A comparison of the critical language contained in the statutes and appointments involved in those cases with the language "*all suits * * * and causes of action*" in the Texas Statute and "*all process of law * * * in any legal action*" in the appointment in this suit will show their essential similarity.

In *Chipman* v. *Jeffrey*, the New York statute provided that a foreign corporation as a prerequisite to obtaining a permit to do business in New York must designate "a person upon whom *process* against such corporation may be served within the state". The designation of a service agent in New York by the defendant, a foreign corporation, stated "* * * the name of the person residing in the State of New York upon whom *process* against the said corporation may be served within the state * * *". In *Hunter* v. *Mutual* the statute provided for the appointment by a foreign

insurance corporation seeking to do business in North Carolina of the Insurance Commissioner "as its agent upon whom *all lawful process in any legal action or proceeding* might be served". In *Morris & Co.* v. *Scandinavia Ins. Co.*, the Illinois Statute provided that a "foreign corporation desiring to transact any such business * * * in this State shall appoint an attorney in this State on whom *process of law* can be served".

The following excerpt from the opinion in *Hunter* v. *Mutual* is illuminating:

> "The next contention is that, even if defendant did withdraw from the state in good faith, the authority to the Insurance Commissioner to receive service of process continues as long as the company had outstanding liabilities in the State. And this, it is insisted, constituted the duration of the authority not only for causes of action arising in the State, but for causes of action arising in other States."

The court in refusing to lend its support to this contention said:

> "The policies upon which the four judgments were recovered were not issued in North Carolina, and not having been issued under the faith of its laws are not entitled to their remedial sanction."

The cases just discussed by us bear added significance to the suit at bar because (1) under the laws of the States involved in those cases suit may be brought against a foreign corporation upon a cause of action arising outside of the State if the corporation is present and doing business in the State

when sued, whereas there is no law, statutory or judicial, in Texas which authorizes a suit against a foreign corporation upon a cause of action arising outside of Texas even though the corporation may be doing business in the State when sued, and because (2) in each of those cases, with the exception of *Hunter* v. *Mutual,* the appointment by the corporate defendant of a service agent and its permit to do business in the State were in full force and effect at the time suit against it was brought, whereas in the instant suit, the respondent had revoked the appointment of its service agent in Texas and cancelled its permit to do business in Texas before this suit was brought and service upon said agent attempted.

## POINT III.

**No jurisdiction was acquired over respondent's person since neither the Texas Statute nor the appointment by respondent of a service agent applies to a suit, such as this, brought against respondent after it had ceased doing business in Texas upon causes of action which accrued before the enactment of the statute and before respondent obtained a permit to do business and appointed a service agent in Texas.**

### *The Authorities.*

The authorities listed under Point II;

*The Texas Constitution,* Article I, Section 16;
*Union Pacific R. R. Co.* v. *Laramie Stockyard,* 231 U. S. 190;
*Hartley* v. *Utah, etc.,* 106 Fed. (2nd) 953;
*Vandenbark* v. *Owens, etc.,* 110 Fed. (2nd) 310;
*U. S.* v. *McKinney,* 107 Fed. (2nd) 879;

*Morrison* v. *B. & O. R. R. Co.,* 117 App. Div. 613 (N. Y.);
*Fairclough* v. *Southern Pacific Co.,* 171 App. Div. 476, affd. 219 N. Y. 657 (114 N. E. 1066);
45 *American Law Reports* 1447 at 1454.

The District Court found that, with the possible exception of one item involving $62.78, all of the causes of action accrued before the enactment of the Texas Statute and before the respondent obtained a permit to do business in Texas and appointed a service agent therein (R. 289-90). This finding is not subject to review by this Court (Point I (A) of this Brief); in any event, it is not only not clearly erroneous but it has substantial support in the evidence (Point I (B) of this Brief).

Neither the statute nor the appointment should be construed by this court as applying to causes of action which accrued prior to the passage of the statute or the execution of the appointment or before respondent obtained a permit to do business in Texas because such construction (1) would give the statute a retroactive effect contrary to the Texas Constitution, Article I, Section 16 and well established rules of statutory construction, and (2) would be contrary to the principle, as established by the cases, that a foreign corporation may by ceasing to do business in a state prevent suit from being brought against it in that state with respect to transactions which occurred before the corporation obtained a permit to do business in the state and appointed a service agent therein.

(1) Prior to the effective date of the Texas Statute on September 1st, 1933 a foreign corporation was not

subject to the jurisdiction of the Courts of Texas after it ceased doing business therein. (See Section 7 of the Statute.) Ever since that time, however, the statute has permitted suit to be brought in Texas against a foreign corporation not only so long as it is authorized to do business in the State but for a period of four years after it should cease doing business therein. To construe the statute as subjecting respondent to a suit in Texas after it ceased doing business and cancelled its permit to do business in Texas, founded upon a transaction which occurred before the statute was enacted, would be to give it a retroactive effect by depriving the respondent of the right it had before the passage of the statute to cease doing business in Texas without being amenable thereafter to suit in that state. Such a construction would violate the Texas Constitution, Article I, Section 16 which provides:

> "No bill of attainder, ex-post facto law, *retroactive law*, or any law impairing the obligation of contracts shall be made." (Italics ours.)

Such a construction also would be contrary to the fundamental and well established rule of statutory construction that a statute is presumed to operate prospectively, not retroactively, and will be given a retroactive construction only if, to quote from the opinion in *Union Pacific R. R. Co.* v. *Laramie Stockyard*, 231 U. S. 190 at 199 (*supra*), "such be the unequivocal and inflexible import of the terms, and the manifest intention of the legislature," and such construction does not impair some constitutional guarantee, Federal or State.

Certainly, the statute does not by "the unequivocal and inflexible import of the terms" thereof operate

retroactively. On the contrary, the language of the statute indicates quite conclusively that it is intended to effect only such business as a foreign corporation may transact in Texas after the passage of the statute. Expressions of futurity such as "shall" appear throughout the statute; Section I of the Statute states: "From and after the effective date of this Act * * * every foreign corporation * * * shall * * *", and Section 5 (a) provides that if a foreign corporation shall fail to designate a service agent as required by the statute "Each of its Acts in this State shall * * * be void; and it shall be incapable * * * of * * * enjoying any right, power, privilege or immunity *that shall not have already accrued* * * *." (Italics ours.)

The decision in *Hartley* v. *Utah, etc.*, 106 Fed. (2d) 953 (*supra*), is applicable to the present suit. In that case the defendant, a Utah corporation, was involved in an automobile accident in Oregon. Subsequent to the accident a law was enacted in Ohio which provided that if a non-resident autoist used the highways of Ohio, he would be deemed to have appointed the Secretary of the State of Ohio as his lawful agent upon whom process could be served in any suit in Ohio against him arising out of an accident in which he was involved when using his automobile in Oregon. Pursuant to this statute, the plaintiff instituted suit against defendant in Ohio by serving process upon the Secretary of State of Ohio. The Court held that there was nothing in the language of the statute to justify applying it to accidents occurring before the enactment of the statute, and it, therefore, dismissed the suit for lack of jurisdiction over the defendant's person.

(2) In every case known to us, and in every case cited by the petitioner, where jurisdiction was sustained in a suit against a foreign corporation after it had ceased doing business in the State where sued, the suit was founded upon a transaction by the corporation in the State *after* it had obtained a permit to do business in the State and had appointed a service agent therein. Such is not the situation in this suit since the transactions upon which it is based accrued *before* the enactment of the Statute and *before* respondent obtained a permit to do business in Texas and appointed a service agent therein.

The rule established by those cases is clearly stated in 45 A. L. R. 1447 at 1454:

> "The rule that the authority of the designated agent of a foreign corporation to receive service of process survives the withdrawal of the corporation from the State operates only in favor of those for whose benefit the statutes were made, viz., persons dealing with the corporation during the time when, by virtue of its designation of an agent, it was authorized to do business in the State."

This rule has been emphasized in many of the cases and authorities relied upon by the petitioner, particularly those on pages 40-47 of his brief. Thus, in 12 R. C. L. Sec. 89, page 113, cited by petitioner on pages 40-41 of his brief, it is stated that a foreign corporation cannot by ceasing to do business in the State from which it obtained a permit to do business escape from the jurisdiction of the courts of that State in an action brought by a resident thereof with whom it has contracted "*under* its permission to do business therein". (Italics ours.) And to mention

just one other case, we would direct this Court's attention to *Meixell* v. *American Motor Sales Co.*, 103 N. E. 1071, appearing on pages 41 and 42 of petitioner's brief, in which the court held that a foreign corporation is subject to suit in a State where it had obtained a permit to do business even after it had cancelled such permit and ceased doing business therein, but only "where the cause of action arises out of a contract made in this State with the corporation *while it was engaged in the exercise of its franchises and the transaction of business in this State under its agreement with the State* * * *." (Italics ours.)

Certainly, then, petitioner is not one in whose favor the rule operates, since the transactions upon which he bases his suit did not occur, to use the language in 47 A. L. R. 1447 at 1554 (*supra*), "during the time when by virtue of its (respondent's) designation of an agent it (respondent) was authorized to do business in the State (Texas)". (Parenthesis ours.)

## POINT IV.

**Neither the Texas statute nor the appointment by respondent of a service agent applies to transactions in Interstate Commerce, and since the transactions in this suit were in Interstate Commerce, no jurisdiction was acquired over respondent's person.**

### *The Authorities.*

The authorities listed under Point II and the authorities cited in the body of this point.

Neither one of the lower courts made any finding as to whether or not the transactions in this suit were

interstate commerce. Certainly, however, all transactions subsequent to June 1927 were in interstate commerce since they involved shipments of produce from points in Texas on consignment to respondent in New York City where they were sold by respondent on a commission basis for the accounts of various companies in Texas to whose rights and interests petitioner claims to have succeeded (R. 72, 74-5, 325, 329-30).

*Furst & Thomas* v. *Brewster, et al.*, 282 U. S. 493;
*Ozark Pipeline Corp.* v. *Monier*, 266 U. S. 555;
*Currin* v. *Wallace*, 306 U. S. 1;
*Butler Bros.* v. *U. S. Rubber Co.*, 156 Fed. 1 (cert. denied 212 U. S. 577);
*Lasater* v. *Purcell Mill*, 22 Tex. Civ. App. 33.
*Dickson Publishing Co.* v. *Bryan*, 5 S. W. (2d) 980 (Texas);
*Allen* v. *Tyson-Jones Buggy Co.*, 91 Tex. 22.

It has been repeatedly held by this court and the courts of other jurisdictions that a state may not require a foreign corporation to obtain a permit to do business in the state or appoint an agent for service of process therein if such business relates to interstate commerce. As this court said in *Sioux Remedy Co.* v. *Cope*, 235 U. S. 197:

> "A requirement that a foreign corporation appoint a resident agent on whom process may be served in an action against it, as a condition precedent to suing in the courts of the state to collect a claim arising out of interstate commerce transactions, is a burden on interstate commerce because it necessarily operates to thwart the pur-

pose of the Constitution to secure and maintain the freedom of such commerce by whomsoever conducted."

See also:

*Furst & Thomas* v. *Brewster, et al.*, 282 U. S. 493 (*supra*);
*Butler Bros.* v. *U. S. Rubber Co.*, 156 Fed. 1 (Certiorari denied 212 U. S. 577) (*supra*);
*Continental Supply Co.* v. *Hoffman*, 135 Tex. 552; 144 S. W. (2d) 253;
*Dickson Publishing Co.* v. *Bryan*, 5 S. W. (2d) 980 (Tex.) (*supra*);
*Allen* v. *Tyson-Jones Buggy Co.*, 91 Tex. 22 (*supra*).

Nor did the appointment by respondent of a service agent operate as a consent to be sued with respect to interstate transactions, despite the broad language of the appointment that said agent had authority to receive on behalf of the respondent "all process of law * * * in any action" against it. As this court said in *Ozark Pipeline Corp.* v. *Monier*, 266 U. S. 555 (*supra*):

> "Nor is it material that appellant applied for and received a Missouri license or that it had the power thereunder to exercise the right of Eminent Domain. These facts could not have the effect of conferring upon the state an authority denied by the Federal Constitution to regulate interstate commerce."

The scope of a statute in Pennsylvania and the designation thereunder by a foreign corporation of a service agent in that state, similar in character to the statute and appointment in this suit, was defined in *Kraus* v. *American Tobacco Co.*, 283 Pa. 146; 129

Atl. 60. In that case the statute provided in language as broad as that in the statute in this suit that a foreign corporation doing business in Pennsylvania must appoint "the Secretary of the Commonwealth as its agent upon whom *all process* may be served, and the authority of such agent shall continue in force so long as any liability remains outstanding against it in the Commonwealth." (Italics ours.) The court said:

> "The plain meaning of this statute is that when a foreign corporation registers hereunder and appoints the Secretary of the Commonwealth as agent on whom legal service may be made, such appointment continues in full force and effect until the corporation bona fide withdraws from the state and ceases to do business thereunder; for so long as it continues to *do business of an intrastate nature,* in Pennsylvania, after having registered, it is liable to be sued here; and *that is the liability referred to in the Act* * * * When a foreign corporation applies for registration, it in effect says to the Commonwealth, 'Let me register and freely sue in your courts, and I will agree that while I continue to do an *intrastate business,* in Pennsylvania whosoever occupies the office of the Secretary of the Commonwealth may be served as my agent.'" (Italics ours.)

While we know of no case in which the particular section of the statute under discussion (Section 1) has been construed with respect to interstate commerce, Section 5(b) of the statute has been so construed. This section provides:

> "Such corporation shall be incapacitated to maintain *any* suit or legal proceeding in any court in this state upon *any* demand; whether arising out of contract or tort." (Italics ours.)

The expressions "any suit" and "any demand" are no more limited than is "all suits * * * and causes of action" in Section 1 of the statute. Yet the courts of Texas have construed Section 5(b) as not applying to suits or demands related to transactions in interstate commerce. In *Continental Supply Co.* v. *Hoffman,* 135 Tex. 552; 144 S. W. (2d) 253 (*supra*), the court said:

> "It is well settled by the decisions of this court that the provisions of Article 1536 (Sec. 5 of the Texas Statute) have reference exclusively to demands which arise out of intrastate transactions. They do not apply to demands which arise out of interstate transactions—that is to say, transactions which involve interstate commerce. *Miller* v. *Goodman* , 91 Tex. 41, 40 S. W. 718; 11 Tex. Jur. p. 162. In a word, as regards interstate transactions no permit to transact business is required." (Italics ours.)

## POINT V.

**The revocation by the respondent of its appointment of a service agent in Texas was effective to defeat service upon him in this suit, although no jurisdiction would have been acquired even if the appointment had not been revoked.**

### *The Authorities.*

*Chipman* v. *Jeffrey,* 251 U. S. 373 (*supra*);
*Mitchell, etc.* v. *Selden,* 257 U. S. 213 (*supra*);
*Morris & Co.* v. *Scandinavia, etc.,* 279 U. S. 405 (*supra*);
*Morris & Co.* v. *Scandinavia, etc.,* 81 Fed. (2) 346 (*supra*);

*Ambrose John* v. *Richman & Samuels, Inc.* (U. S. District Court, Texas, see Appendix, pp. i to iv) (*infra*).

It is not disputed that prior to the commencement of this suit respondent revoked the appointment of the service agent upon whom the citation in this suit was served (R. 126-7). Service upon him, therefore, was a nullity and ineffective to bring respondent within the jurisdiction of the court in which this suit was filed.

However, under the authorities and the decisions of this Court no jurisdiction would have been acquired over respondent's person even if the appointment had not been revoked because the respondent was not doing business in Texas at the time this suit was brought and service was made and the causes of action arose outside of Texas. The test of jurisdiction as established by the authorities, where the suit is founded upon a cause arising outside of the state in which the suit is brought, is not whether the appointment of the service agent by the corporation is in effect and unrevoked at the time of service upon him, but whether the corporation is doing business in the state at the time of such service. If the corporation is not doing business in the state at the time of service, jurisdiction cannot be obtained even though the appointment of its service agent is in full force and effect at the time of service upon him (See the cases cited under the caption, *The Authorities,* of this point). Compare the statutory provisions relating to the duration of the authority of the service agent appointed by the foreign corporation in those cases with that involved in this suit and which provides that such authority shall continue "so long as said corporation

is authorized to do business in Texas, and for a period of four years from and after the date any such foreign corporation shall have surrendered its charter or ceased to do business in Texas." In *Chipman* v. *Jeffrey* the New York Statute provided that the authority of the service agent "shall continue in force until revoked by an instrument in writing designating in like manner some other person upon whom process against the corporation may be served in this state."; in *Morris & Co.* v. *Scandinavia, etc.*, 81 Fed. (2d) 346, the Illinois Statute provided that "the agent last designated or acting for such corporation shall be deemed to continue agent for such corporation for the purpose of serving process * * *"; in *Morris & Co.* v. *Scandinavia, etc.*, 279 U. S. 405, the Mississippi Statute provided that the authority of the service agent "shall continue in force irrevocable so long as any liability of the company remains outstanding in this state"; and in *Mitchell* v. *Selden, etc.*, the Ohio Statute provided that the foreign corporation shall file "an irrevocable consent of such corporation to service of process upon such agent so long as the authority of such agent shall continue * * *"

## POINT VI.

### Answering Petitioner's Arguments.

At the outset we should state that none of the cases or authorities cited by the petitioner defeats any of respondent's contentions or supports the construction of the statute and appointment urged by him. In every case cited by petitioner, and in every case known to us, where jurisdiction *in personam* over a foreign corporation was sustained either (1) the cause

of action accrued in the state where suit was brought and out of business transacted by the corporation in the state under a permit from the state to transact such business, or (2) the corporation was present and doing business in the state under a permit to do such business at the time suit against it was brought. Neither of such situations exists in this suit since, as we have previously shown, (1) the causes of action asserted by petitioner did not arise in Texas, nor did they grow out of business transacted by the respondent in Texas under its permit to do business in Texas, and (2) the respondent was not present and doing business in Texas at the time this suit was brought, or at any time since, and prior to such time it had cancelled its permit to do business in and had ceased doing business in Texas, and had revoked the appointment of its service agent prior to the time service of process in this suit was made upon him.

### *Answering Petitioner's Point II.*

Petitioner contends that neither the statute nor the appointment is limited in its application to causes of action arising in Texas, or out of business done by respondent in Texas, and that respondent, by voluntarily complying with the statute and appointing a service agent in Texas, submitted itself to the jurisdiction of the Courts of Texas in any suit that might be brought against it so long as it was doing business in Texas and for four years after it should cease doing such business, regardless of where the cause of action might arise. He bases his contention upon the broad language of the statute "all suits, proceedings, and causes of action", and of the appointment, "all process of law * * * in any legal action or proceeding", which language, he argues, contains no

limitation or restriction upon the situs of the cause of action upon which suit against a foreign corporation may be brought in Texas.

The construction urged by petitioner has no juridical support, and, as we have shown under the second, third, and fourth points of this brief, is contrary to the authorities and the decisions of this court, by virtue of which the statute and the appointment must be construed as applying only to causes of action accruing in Texas after the statute went into effect and after respondent obtained a permit to do business in Texas and appointed a service agent therein. The flaw in petitioner's reasoning is that it not only fails to take into consideration the purpose of the statute and the appointment, but it also completely removes the above quoted language from their places in the contexts of the statute and the appointment which, by their repeated references to the doing of business in Texas by a foreign corporation, must be deemed to qualify and limit "all causes of action" and "any legal action" to "any" and "all" causes of action accruing in Texas. Certainly, there can be no more justification for construing the statute and the appointment as applying to a cause of action arising outside of Texas than there can be for giving such a construction to Section 5 (b) of the statute which, though containing language equally as broad, has been interpreted by the Texas Courts as applying only to causes of action arising in Texas (this Brief, pp. 29, 30).

*Neibro Co.* v. *Bethlehem Ship Building Corp., Ltd.*, 308 U. S. 165, cited by petitioner in support of the construction urged by him, is not even remotely in point. In that case the defendant foreign corporation, unlike the respondent in this suit, was doing business in, had its chief executive offices in, had a

permit to do business in, and had a service agent in the state and district in which suit was brought against it at the time such suit was brought and service had. There was no question in that suit as to where the cause of action arose; the only question was whether the defendant by its appointment of a service agent in the state had waived the provisions of Sec. 51 of the Judicial Code, 28 U. S. C. A. 112, and, therefore, its right to have the suit brought in the district of either its residence or the residence of the plaintiff. There is no question of venue involved in the present suit because, before there can be such a question, there must be potential jurisdiction, and, as we have previously shown, no jurisdiction was acquired in this suit.

Petitioner submits excerpts from several general propositions of law as stated in the Restatement of the Law of Conflict of Laws. However, these excerpts are not only misleading because the propositions from which they are taken are not given in their entirety, but they are meaningless because they do not assume the identical facts involved in this suit. In any event, if petitioner gathers strength from such general propositions, we may likewise. For instance, on page 28 of his brief, petitioner quotes the following language from Sec. 91, Sub. C, of the Restatement of the Law of Conflict of Laws:

> "The authority may be interpreted to extend to all causes of action, no matter where arising, brought against the corporation in the State, *or it may be limited to causes of action arising within the State;* it may be revocable at any time, *or it may be irrevocable as to causes of action arising within the State prior to an attempt to revoke it.*" (Italics ours.)

We have shown under Point II of this brief that the authority of respondent's service agent must be interpreted as being limited to causes of action arising in Texas.

### *Answering Petitioner's Point III.*

Petitioner's contention that the evidence is undisputed that his contracts with respondent were made in Texas, that he performed his services under those contracts in Texas, that respondent's agents solicited his business in Texas, and that, therefore, his causes of action arose in Texas, is contrary to the findings of the lower courts both with respect to the petitioner's conclusion that the causes of action arose in Texas and the facts upon which he bases his conclusion (R. 282-4, 289, 402-4). While, as we have shown under Point I of this brief, neither the evidence nor the findings of the lower courts may be reviewed by this court, such findings are not only not clearly erroneous but they have substantial support in the evidence.

Petitioner claims that the findings of the lower courts that the causes of action arose outside of New York were based only upon a consideration of where respondent agreed to pay him for his services, not upon a consideration of where the contracts were made, where he performed his services, and where respondent solicited his business. The opinions of both lower courts show otherwise. Petitioner contends that, in any event, there is sufficient evidence in the record that he was to be paid for his services and for his produce in Texas. As we have shown on pages 7 to 9 of this brief, there is not only no such evidence, but that wherever there is any evidence with respect to these matters it shows that respondent

agreed to make and did make payments and accountings to the petitioner at its New York offices.

Petitioner claims that the contracts were made in Texas and that, therefore, at least a part of the cause of action asserted by him accrued in Texas. He relies upon Article 1995, Sub. 27, of the Revised Civil Statutes of Texas and two cases, *Stanolind, etc.,* v. *Christian* and *Hoffer, etc.,* v. *Brian,* decided by State Courts in Texas, construing said statute, in support of his contention that respondent was subject to suit in any county of Texas where the cause of action or a part thereof accrued. These authorities are not in point for two reasons: (1) The statute is expressly limited by its terms to a foreign corporation "doing business within this State (Texas)" and in each of the two cases the defendant corporation, unlike respondent in the suit, was doing business in the state and had a service agent therein when sued, and (2) as stated above, there is a total absence of evidence that the contracts were made in Texas or that any part of any cause of action arose in Texas.

### *Answering Petitioner's Point IV.*

Petitioner contends that the Texas Statute applies to causes of action arising out of business conducted by a foreign corporation in Texas while it is engaged in business therein, and is not limited to causes of action arising within that state; and that since, as he claims, the causes of action here involved are of the former kind, the Statute applies to this suit.

The cases of *Louisville, etc.,* v. *Chatters, etc.,* 49 S. Ct. 329, and *Wefel* v. *W. P. Brown, etc.,* 58 Fed. (2d) 667, relied upon by petitioner in support of the

construction urged by him are not in point; and there is no evidence to support the facts assumed by him. As regards the evidence, petitioner asserts that "an examination of the record in this case will lead this court to the inescapable conclusion that petitioner's cause of action relates to and grew out of business relations had with respondent in Texas while it was engaged in business in Texas". It is significant, however, that in making this reference to the record he has failed to comply with the Rules of this court in not stating on what pages of the record the relevant evidence may be found. In any event, there is a total absence of evidence that respondent was engaged in business of any kind in Texas between the time when petitioner's employment with respondent was terminated in June 1927 and August 13, 1934, when respondent obtained a permit to do business in Texas (R. 158, 189-90, 113); and the only transactions involved in this suit subsequent to June 1927 were connected with shipments in interstate commerce on consignment to respondent at its place of business in New York, and any and all business engaged in by respondent with respect to these transactions took place at its New York offices (This Brief, p. 9). Certainly, such transactions did not give rise to causes of action arising out of business conducted by respondent in Texas.

As to the two cases relied upon by petitioner, they are not applicable to this suit because in each one of them the defendant foreign corporation, unlike the respondent in this suit, was doing business in, had a permit to do business in, and had a service agent in the state at the time suit against it was brought and service upon such agent had. Furthermore, in the *Louisville* case the statute involved expressly pro-

vided that the authoriy of the service agent appointed by a foreign corporation was limited to a liability "growing out of or connected with the business done by said corporation in this state", whereas the Texas Statute contains no such limiting language; and in the *Wefel* case the only question involved was one of venue, whether the service agent appointed by the corporation was properly served in a district of the state other than that in which suit was filed, whereas no such question is involved in the present suit because respondent was not subject to suit in any district of Texas.

The Perishable Agricultural Commodities Act, 7 U. S. C. A., Sec. 499 (b), and *Iwata* v. *Western Fruit Growers,* 90 Fed. (2d) 575, do not support petitioner's contention that by virtue thereof respondent was required to render accountings and make payments to the petitioner in Texas with respect to the consignment shipments involved in this suit. First, that Act became law in June, 1930, and, therefore, does not apply to transactions prior to that date; and, second, that Act and case hold only that a consignee subject to the Act must account promptly with respect to consignments, but there is nothing in the Act nor in the case which states where the accounting must be made.

### *Answering Petitioner's Point V.*

An answer is hardly required to petitioner's contention that unless respondent is subjected to the jurisdiction of the Courts of Texas he will be relegated to the courts of New York where he will be unable to obtain relief because his causes of action are barred by the Statute of Limitations of that State. Obviously, the question of jurisdiction now before this court is in no manner dependent upon whether or not the

petitioner may obtain relief in New York or in any other state in the event that the Texas courts have no jurisdiction. It is our belief that the causes of action are also barred by lapse of time under Texas law, but certainly any arguments that we might advance in support of this belief would be entitled to no more consideration by this Court in deciding whether jurisdiction exists in this suit than are the arguments advanced by petitioner that his causes of action are barred under New York law but not under Texas law. Whether petitioner's suit is barred under New York law but not under Texas law because of lapse of time was not an issue in the lower courts and is not an issue in this Court.

### *Answering Petitioner's Point VI.*

Petitioner contends that the revocation by respondent of the appointment of its service agent prior to service upon him in this suit was ineffective to defeat such service because (1) respondent did not file such revocation in the Office of the Secretary of State of Texas and did not appoint another service agent in his place and stead, and (2) respondent could not escape from the jurisdiction of the courts of Texas as to an action brought by "a citizen of Texas, or one arising out of the contract made while the corporation is engaged in business in Texas". Neither the evidence nor the law supports petitioner's proposition.

(1) There is no requirement in the Statute, express or implied, that the revocation by a foreign corporation of the appointment of its service agent must be filed in the office of the Secretary of State

of Texas or in any other place; and while Section 3 of the Statute provides that in the event of such revocation, the corporation shall substitute the name of some other service agent, there is nothing in the Statute which would continue the authority of the service agent, whose appointment was revoked, by reason of its failure to appoint another service agent in his place and stead. In any event, as we have shown under Point V of this brief, no jurisdiction would have been acquired in this suit even if respondent had not revoked the appointment of its service agent.

(2) As for petitioner's contention that the authority of respondent's service agent was irrevocable as to an action "arising out of the contract made while the corporation is engaged in business in Texas": There are many contracts declared upon in this suit, not one (This brief, pp. 7 to 9), and, as we have shown in our answer to petitioner's 3rd and 4th points, the contracts were made in New York, not in Texas, and none of the causes of action arose out of business conducted by respondent in Texas while it was doing business there. None of the many cases cited by petitioner in support of his proposition is applicable to this suit because in each such case the cause of action accrued *within the state* and *after* the defendant foreign corporation had obtained a permit to do business in and had appointed a service agent in the state. Rather, do these cases support our contention that the Texas Statute and the appointment by respondent of a service agent applies only to causes of action arising in Texas, not to causes of action, such as are involved in this suit, arising outside of Texas. Thus, to mention but one of the cases cited by petitioner, we would refer this court to the following

language in the opinion in *Kelly* v. *Johnson Nut Co.*, 38 Fed. (2d) 177, appearing on page 45 of petitioner's brief:

> "Or, more properly, we think, the designation of an agent to receive service of process, as a condition precedent to doing business within the State, is regarded as a contract for the benefit of resident creditors, to submit to jurisdiction, *which applies to all liabilities created within the State and which, as to such liabilities, is irrevocable.*" (Italics ours.)

## POINT VII.

**Petitioner has given no reason why this Court should grant his petition for a writ of certiorari.**

Of the many reasons relied upon by petitioner for the allowance of a writ of certiorari, only his third, fourth, seventh and tenth reasons attempt to meet the requirements established by Rule 38(5) of the Rules of this Court. His ninth reason, that the decision of the Circuit Court of Appeals in this suit is "probably in conflict with what *will be* the local decisions on that question of the courts of Texas * * *" obviously does not meet any of the said requirements in that petitioner does not claim that the decision of the Circuit Court of Appeals *is* in conflict with applicable local decisions. In any event, as we have shown under Point II of this brief, the decision of the Circuit Court of Appeals is in harmony with the decisions of at least two Federal District Courts sitting in Texas, although, there does not seem to be any decision of a Texas State Court construing the statute and the appointment involved in this suit.

Petitioner's 3rd, 4th, 7th and 10th reasons are that the decision of the Circuit Court of Appeals is in con-

flict with the decisions of this Court in *Louisville, etc.* v. *Chalters, etc.*, 49 S. Ct. 329, and *Neibro Co.* v. *Bethlehem, etc.*, 60 S. Ct. 153, and the decisions of Texas State Courts in the cases of *Hoffer Oil Corp.* v. *Brian*, 38 S. W. (2d) 596, and *Stanolind Oil & Gas Co.* v. *Christian*, 64 S. W. (2d) 363.

The conflicts claimed do not exist. Neither the facts nor the principles of law involved in those cases are similar in nature to those in this suit; the chief distinguishing factor in those cases being that in each case the defendant foreign corporation was actually doing business in the state under a permit to do such business and the authority of its service agent was in full force and effect at the time suit against it was brought and service upon said agent had, whereas at the time this suit was brought respondent was not doing business of any kind in Texas, had no permit to do such business, and had no service agent upon whom service could be validly made. We have shown this on pages 38 to 39 of this brief with respect to the *Louisville* case, on pages 34 to 35 with respect to the *Neibro* case, and on page 37 with respect to the *Hoffer* and *Stanolind* cases.

## CONCLUSION.

**Petitioner has given no reason why this court should exercise its discretionary powers of review and, therefore, his petition for a writ of certiorari should be denied.**

Respectfully submitted,

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